No.
80-268

Supreme Court, U. S.
FILED
AUG 29 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

FREDERICK McCURRY
WALTER ROSENBAUM
DOMINIC CORVINO,
Petitioners

v.

UNITED STATES OF AMERICA

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL APPENDIX TO JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOEL HARVEY SLOMSKY, ESQUIRE
2400 Two Girard Plaza
Philadelphia, PA 19102
(215) LO 8-6188

Attorney for Petitioners
Frederick McCurry
Walter Rosenbaum
Dominic Corvino

TABLE OF CONTENTS
TO SUPPLEMENTAL APPENDIX
JOINT PETITION FOR A
WRIT OF CERTIORARI

		Page
1.	Memorandum and Order of the District Court dated September 7, 1979	1

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL

v.

FREDERICK McCURRY, et al. : No. 79-140

MEMORANDUM AND ORDER

FULLAM, J. September 7, 1979

In this complex, multi-defendant criminal proceeding arising from an alleged cigarette-smuggling operation of great magnitude, this Court held what amounted to an omnibus hearing on July 23, 1979, and ruled upon various pre-trial motions filed by the defendants. Among other things, the Court deferred ruling on defense motion to dismiss the indictment on the ground of prosecutorial misconduct.

On August 20, 1979, the Court of Appeals for the Third Circuit handed down its Opinion in the case of United States v. Serubo, et al., F.2d (3d Cir., Nos. 78-2505, 2506 and 2507); in that Opinion, the Court carefully re-examined the question of grand jury pro-

ceedings tainted by prosecutorial misconduct, and provided fresh insights concerning the proper exercise of a court's supervisory function in such circumstances.

The Grand Jury proceedings in the present case were conducted on behalf of the Government by the same attorney, a member of a Department of Justice Organized Crime Strike Force, who was found to have acted improperly in the Serubo case. The defendants have therefore now renewed, and indeed somewhat expanded, their challenges to the Indictment. I agree that it is appropriate to reconsider the entire matter, in light of the intervening decision in Serubo.

I. THE HOLDING OF THE SERUBO CASE

In Serubo, the Court of Appeals had before it a partial transcript of the Grand Jury proceedings, containing the testimony of 32 of the total of 50 witnesses who appeared before one or more Grand Juries in that case. The partial transcript disclosed several instances of what the Court variously characterized as "improper, reprehensible and un-

acceptable" conduct, "egregious...misconduct" and "extreme" misconduct (misleading attempts to convey the impression that the defendants were connected with notorious organized crime figures, in the absence of any evidentiary basis for the accusation; and comments upon the credibility of witnesses); and several instances of "borderline" misconduct (badgering of uncooperative witnesses). The Court held that, if the Grand Jury which returned the indictments had been exposed to these instances of improper behavior by the prosecutor, the indictments should be dismissed, notwithstanding the fact that there may have been ample untainted evidence to justify the indictments.

It appeared, however, that most, and perhaps all, of the alleged misconduct had occurred before a predecessor Grand Jury, and the Court found it impossible to determine whether the indicting Grand Jury had read the tainted transcripts. On the other hand, there was also the possibility that additional instances of misconduct might have occurred in the course of the testimony of the 18 witnesses whose testimony had not yet been reviewed by

the Court. In these circumstances, the Court ruled as follows: (1) the entire transcript should be disclosed to the defendants; (2) the trial court should hold a further hearing (a) to determine whether the indicting Grand Jury had been exposed to the taint established by the record as thus far disclosed, and (b) to consider any additional instances of misconduct which might be revealed by the complete transcript; (3) if the indicting Grand Jury had indeed read the transcript which was before the Court of Appeals, the Indictments should be dismissed; (4) if the indicting Grand Jury had not been exposed to the established improprieties, the trial court should nevertheless consider whether the record which was before the indicting Grand Jury established prosecutorial misconduct which would justify dismissal; and (5) at the conclusion of the proceeding, the trial court should, in any event, forward the offending transcripts to the office of the Attorney General for appropriate disciplinary measures.

II. THE PROCEDURAL IMPLICATIONS OF THE SERUBO DECISION

In expressing its view that, in some circumstances, dismissal of an indictment for prosecutorial misconduct is an appropriate prophylactic measure notwithstanding the absence of prejudice to the defendant, the Court included the following language:

> "Our reading of Birdman [U.S. v. Birdman, F.2d (3d Cir., June 25, 1979)] is that dismissal of the Indictment may be proper even where no actual prejudice has been shown if there is evidence that the challenged activity was something other than an isolated incident unmotivated by sinister ends, or that the type of misconduct challenged has become 'entrenched and flagrant' in the circuit...
>
> "We suspect that dismissal of an indictment may be virtually the only effective way to encourage compliance with these ethical standards, and to protect defendants from abuse of the grand Jury process. Certainly the constant flow of cases to this Court involving prosecutorial misconduct before petit juries demonstrates that judicial 'tongue-clicking; and adjurations as to the 'better practice' are likely to have little impact on the problem..."

On the basis of the actual holding in Serubo, and on the basis of the quoted language from that Opinion, the defendants in the present case seek (1) immediate disclosure of the

entire Grand Jury transcript, and (2) discovery concerning all other cases in which this particular Strike Force attorney has conducted Grand Jury proceedings. They argue that the former is necessary to reveal his conduct in the present case, and that the latter is necessary to enable them to mount an argument that prosecutorial misconduct is pervasive and calls for the prophylactic measure of dismissal. I reject these arguments.

In the first place, no amount of misconduct by the Strike Force attorney (Mr. Pichini) in other cases has any bearing upon the present case unless there was misconduct in the present case. The starting point, therefore, is an evaluation of his conduct in the present case. Only if it should develop (1) that there was serious misconduct in the present case and (2) that this Court declined to dismiss the Indictment, would the possibility of a pattern of misconduct established by other cases become even arguably relevant.

In the second place, the disclosures mandated in Serubo were post-trial disclosures. There is considerably less need for circum-

spection in dealing with Grand Jury transcripts after judgment of conviction (following trial or, as in Serubo, a guilty plea), than before trial.

In short, I am persuaded that the Serubo Opinion was not intended, and should not be treated, as equivalent to a bill of attainder with respect to Mr. Pichini's participation in prosecutions, or as revolutionizing the law of Grand Jury secrecy and discovery in criminal cases.

It must nevertheless be conceded that the procedural implications of the Serubo decision are not altogether clear. The Government is unlikely to raise the issue of prosecutorial misconduct before the Grand Jury. The defendant has that right, but, generally speaking, is not in a position to learn of such misconduct, or to substantiate any charges he may make in that regard. But one may safely assume that defense counsel will not be hesitant to file such motions in virtually every case. How can such motions be decided, except by either disclosing the

entire Grand Jury transcript to defense counsel, or reviewing the entire transcript in camera? Yet both of these alternatives are essentially unsatisfactory. Pretrial disclosure to defendants would gravely undermine the efficacy of the Grand Jury as an institution. In camera inspection by the Court would, in many cases, raise serious questions concerning the desirability of recusal. And either alternative would produce undesirable delay, antithetical to the purposes of the Speedy Trial Act.

Perhaps some of these difficulties could be alleviated by deferring the entire inquiry until after trial. Or it might be possible to establish a procedure for review of challenged transcripts by a federal magistrate or other neutral official.

Whatever additional procedural steps may become necessary in the wake of the Serubo holding, the fact remains that dismissal of an indictment for prosecutorial misconduct is unlikely to become a frequent occurrence. There is room for hope that, as prosecutors generally become familiar with the implications of Serubo, the presumption of regularity

traditionally accorded Grand Jury indictments may again be safely indulged in by both defense counsel and the courts.

Without attempting to establish a general procedural approach applicable in all cases, I am satisfied that, at the very least, neither pretrial disclosure nor pretrial in camera inspection of the Grand Jury transcripts should occur in the absence of a colorable claim that misconduct may have occurred. Because a colorable basis for a claim of misconduct was established in the present case I have, at the defendants' request and with the concurrence of the Government, carefully reviewed all of the evidence submitted to the Grand Jury, including the transcripts of the testimony of some 26 witnesses, for the purpose of determining (1) whether there was prosecutorial misconduct which would justify outright dismissal of the Indictments, under the Serubo standards; and (2) if not, whether there was any evidence of misconduct sufficient to form a plausible basis for challenging the Indictment or for the imposition of other sanctions, so that, in fairness to the defendants, pretrial

disclosure of the Grand Jury transcripts should be required, in order to enable the defendants to pursue the matter. For the reasons set forth below, I have concluded that no further disclosure is necessary, and that there is no reason to dismiss the Indictment or impose any other sanction.

III. THE MERITS

The instances which, at first blush, might be regarded as creating arguable grounds for a charge of prosecutorial misconduct fall into four categories. As to three of these categories, adequate disclosure of what occurred before the Grand Jury has already taken place: (1) references to, and newspapers articles concerning, the murder of one Michael Connolly; (2) questioning of the defendant Rosenbaum and the two Breggars, before the Grand Jury in connection with obtaining their fingerprints and handwriting exemplars.

There was a great deal of evidence before the Grand Jury to the effect that, from 1972 until shortly before his death in 1976, Michael Connolly was the "partner" of the defendant

McCurry in organizing and operating the cigarette-smuggling enterprise; that serious disagreements arose between the two men, as a result of which the defendant McCurry terminated the "partnership;" that Connolly was found murdered; that the termination of the partnership and the later demise of Mr. Connolly were discussed among the conspirators (in tape-recorded conversations); and that McCurry mailed newspaper clippings concerning the murder to another member of the conspiracy (it was these clippings which were presented to the Grand Jury). I fail to see how the Grand Jury could properly have carried out its function of investigating the enterprise without becoming aware of the unfortunate fate of Mr. Connolly. Mr. Pichini's handling of this aspect of the proceeding was exemplary. The sole source of information presented to the Grand Jury on this subject was the defendant McCurry. Mr. Pichini made no comment or argument on the subject.

Mr. Rosenbaum was called before the Grand Jury and asked a few questions about the case.

In each instance, he exercised his Fifth Amendment privilege. The questioning was not prolonged, and when it became apparent that he was unwilling to cooperate, the questioning ceased. It is apparent that the principal purpose of the prosecutor was to afford Mr. Rosenbaum an opportunity to become a cooperative witness. He was not badgered; and the questions were based entirely upon other evidence properly submitted to the Grand Jury.

In my view, the only instances in which Mr. Pichini's conduct is properly subject to criticism were those involving that Grand Jury's attempts to obtain fingerprints and handwriting exemplars from three of the defendants. Mr. Pichini did become impatient with what he (understandably) regarded as the totally unjustified refusal of the three defendants to provide exemplars, and engaged in somewhat excessive exhortation on the subject. In the final analysis, however, he accurately advised the defendants of their rights, and scrupulously accorded them their just due. Perfection is not required.

The remaining item, which may not heretofore have been disclosed to the defendants, consisted of the following questions, addressed to a low-level employee of the company which was illegally supplying untaxed cigarettes (the surviving principal of which company is a defendant who has pleaded guilty and is cooperating with the Government) concerning a deceased principal officer of that company:

"Q. Did Paul Vincent spend much time at the company?

"A. No, sir.

"Q. Were there any kind of rumors that he was into cocaine?

"A. Yes, sir.

"Q. What were the rumors?

"A. Sir?

"Q. What were the rumors? What were they saying?

"A. I heard that he was into cocaine."

Injecting rumors into the record by means of leading questions is plainly improper, but since this evidence had nothing to do with any of the defendants, they were plainly not prejudiced. Moreover, there is no rational basis for suggesting that the prosecutor was

attempting to blacken the character of any of the defendants, or to mislead the Grand Jury concerning the defendants. In fairness to the prosecutor, it may be that he was trying to shed light on the peripheral question of why a relatively young and apparently successful businessman would have become involved in the smuggling enterprise, or perhaps seeking an explanation for Mr. Vincent's death (stated by other witnesses to have been from "natural causes") at a relatively early age. If that was his purpose, it is unfortunate that he chose the "rumor" approach. The entire episode is, however, insignificant for present purposes.

The renewed Motion to Dismiss the Indictment will be denied.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL

v.

FREDERICK McCURRY, et al. : NO. 79-140

O R D E R

AND NOW, this 7th day of September, 1979, it is hereby ORDERED that the Motion to Dismiss the Indictment is DENIED.

/s/

J.